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No. 08-1425

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In the Supreme Court of the United States

ROBERT WELCH, Warden,
Petitioner,

v.

JOHN C. MOORE, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

The sole premise of Respondent John C. Moore, Jr.'s Brief in Opposition is that the state courts "consistently recognized" that his *pro se* request was timely and proper. Opp. at 5 and 8. Because that premise is patently false, Moore's opposition lacks any footing.

The question in this litigation—which Moore leaves unaddressed—is whether the Sixth Circuit erred in holding that the trial court's failure to issue an explicit, formal ruling on Moore's request for self-representation constituted a *per se* constitutional violation. And the answer is that the Sixth Circuit did err. The trial court's failure formally to deny Moore's self-representation request is not an automatic basis for granting a writ of habeas corpus, because the continuation of the proceedings with counsel in place amounted to a denial of Moore's request. Therefore, the proper inquiry on habeas review was whether that denial violated Moore's Sixth Amendment rights—an inquiry the Sixth Circuit never undertook.

In any case, no Sixth Amendment violation occurred here because there is no clearly established right to self-representation where, as in this case, the request for self-representation was untimely.

Moore's Opposition offers no defense of the Sixth Circuit's unprecedented bypass of the core constitutional question, nor does he attempt to defend his eleventh-hour *pro se* request as timely.

A. No support exists for Moore's argument that the state courts found his *pro se* request timely and proper.

All of Moore's reasons for opposing the writ of certiorari are based on his claims (1) that "the state courts consistently recognized that Respondent Moore's request to proceed pro se was timely," Opp. at 5, and (2) that the state Court of Appeals found that Moore's *pro se* request was "properly" presented. Opp. at 8. Based on those assertions, Moore argues that the trial court violated clearly established federal law by forgoing a *Faretta* analysis.

But Moore's arguments distort the state courts' rulings. The trial court never recognized Moore's request as timely. To the contrary, when Moore asked the trial court if he could proceed *pro se* on the fourth day of trial, the trial court replied: "It is too late for that now. You have already started with an attorney. I don't believe you can go [*pro se*] mid trial." App. 106a. Although the trial court allowed Moore to elaborate on his *pro se* request through a written letter the court never retreated from its view that Moore's request was "too late."

Similarly, the state appellate court did not affirmatively find Moore's request timely. Although the court opined that a *pro se* request need not be made before trial in order to be timely, App. 112a-1131, it never reached the sweepingly converse conclusion that *all* mid-trial requests are therefore timely, and it never affirmatively held that Moore's request—made on the fourth day of a five day trial—was timely presented. The appellate court's timeliness analysis trails off because the court denied Moore's Sixth Amendment claim for an

independent reason—that Moore waived any right to self-representation when he permitted himself to be examined on the stand by his counsel after requesting to proceed *pro se*. App. 114a. Accordingly, Moore's claim that the state courts "consistently recognized" that his *pro se* request was timely is without merit.

Nor can it be said that the state court of appeals found Moore's *pro se* request "proper." Instead, the court found that Moore's actions "contradicted" themselves, and that, ultimately, Moore waived any right to self-representation by allowing his attorney to continue representing him. *Id.*

Moore's arguments in defense of the Sixth Circuit's opinion therefore fail. They are all based on the false assertion that the state courts found his *pro se* request timely and proper. The trial court denied Moore's request—albeit implicitly—and the state court of appeals refused to find any constitutional problem in that denial.

B. The trial court's failure to issue a formal denial of Moore's self-representation request is not an automatic basis for granting a writ where the continuation of the proceedings with trial counsel in place was equivalent to a denial of the request.

Ultimately, Moore ignores the central issue raised by the Warden—that no basis existed for the Sixth Circuit to find that the trial court's "fail[ure] to rule" formally on Moore's *pro se* request constituted

an automatic violation of his Sixth Amendment right to self-representation. App. 25a.

The Sixth Circuit's ruling ignores the fundamental principle—affirmed by many courts, see Pet. at 10-11—that a motion is denied whenever the court enters a final judgment or conducts any proceedings inconsistent with the granting of the motion. It is undisputed that the trial court did not permit Moore to proceed *pro se* here. Accordingly, the proper inquiry on federal habeas review is whether that denial violated Moore's Sixth Amendment rights.

By skirting that core question, the Sixth Circuit effectively gutted the principles of comity and deference afforded to state court decisions under AEDPA. That is, a trial court's failure to rule formally on a request or motion should not automatically warrant a writ where proceedings inconsistent with the request amount to an implicit denial. Rather, the courts should be required to address the core constitutional question—in this case, whether the trial court's denial of Moore's self-representation request violated his Sixth Amendment rights.

C. The trial court did not violate Moore's Sixth Amendment rights by denying his request to proceed *pro se*.

The federal courts have widely held that the right to self-representation is not absolute and can be waived in various ways—for instance, where the defendant fails to make a timely request, or by conduct giving the appearance of uncertainty. See, e.g., *Martinez v. Court of Appeal*, 528 U.S. 152, 161-

62 (2000); *McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984); *United States v. Edelmann*, 458 F.3d 791, 808 (8th Cir. 2006); *United States v. Singleton*, 107 F.3d 1091, 1096-97 (4th Cir. 1997). In those situations, the decision to allow *pro se* representation rests in the trial court's sound discretion. *Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1986); *United States v. Lawrence*, 604 F.2d 1321, 1325 (4th Cir. 1979).

As this Court and the majority of federal courts have recognized, a defendant must assert his *Faretta* rights in a timely manner, and courts are afforded significant discretion to deny untimely requests for self-representation without conducting a full-blown *Faretta* hearing. Pet. at 13-15.

Moore contends, without citation, that "in each case cited by the Warden the motion was not denied until after the appropriate *Faretta* inquiry had been conducted." That is wrong. In *United States v. Edelmann*, 458 F.3d 791, 808-09 (8th Cir. 2006), for instance, the Eighth Circuit affirmed the trial court's denial of the defendant's request for self-representation as untimely and as a delay tactic, without any indication that the court had conducted a *Faretta* hearing. Other cases are to the same effect. See, e.g., *United States v. Young*, 287 F.3d 1352, 1353-55 (11th Cir. 2002); *United States v. Brown*, 744 F.2d 905, 908 (2d Cir. 1984).

Moore's *pro se* request was made even later in the trial than most of the requests in other federal cases cited by the Warden where the courts held the request untimely. Accordingly, the trial court's denial of Moore's self-representation request did not violate clearly established federal law, and the Sixth

Circuit exceeded its authority under AEDPA in granting the writ.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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